Supreme Court of the United States

OCTOBER TERM, 1938.

No. 245.

THE UNITED STATES OF AMERICA, PETITIONER,

VS.

ALGOMA LUMBER COMPANY, A CORPORATION.

No. 246.

THE UNITED STATES OF AMERICA, PETITIONER,

VS.

FOREST LUMBER COMPANY, A CORPORATION.

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VS.

LAMM LUMBER COMPANY.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

BRIEF FOR RESPONDENTS ALGOMA LUMBER COMPANY AND FOREST LUMBER COMPANY.

JESSE ANDREWS,
CARL D. MATZ,
WILLIAM S. BENNET,
Attorneys for Respondents, Algoma Lumber Company and Forest Lumber Company.

INDEX

CITATIONS

Cases:

Regulations and Instructions for Officers in Charge of Forests on Indian Reservations:

Statutes:

Miscellaneous:

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SUPPLEMENTAL STATEMENT.

Respondents concur in the statement of petitioner that a determination of the applicable question of law in either the Algoma Lumber Company or the Forest Lumber

Company cases will be determinative of both cases. We will follow the course of petitioner in letting the references to the findings of fact be to the record in the Algoma case, except where otherwise shown by the context.

On March 21, 1917, the Assistant Secretary of the Interior approved a form of contract and regulations, and also a form of advertisement, for the sale of about 250,000,000 feet of pine and 10,000,000 feet of white fir upon approximately 15,700 acres, within certain townships, on what is known as Middle Mount Scott Unit, Klamath Indian Reservation, Klamath, Oregon. The form of contract, as approved, provided that it would extend for a period of fifteen years from April 1, 1917 (R. 10).

The advertisement required that sealed bids be addressed to the Superintendent of the Klamath Indian School, Klamath Agency, Oregon. Each bidder was required to state in his bid, for each species, the amount per M feet to be paid for all timber cut prior to April 1, 1920. The advertisement prescribed that prices subsequent to that date were to be fixed by the Commissioner of Indian Affairs, by three-year periods, within a certain limitation. Prospective bidders were informed that no bid less than $3.25 per M feet for pine, or 50¢ for white fir, for the first period, would be considered. Bids were required to be accompanied by a certified check in favor of the Superintendent of the Klamath Indian School in the amount of $5,000.00 (R. 11).

On May 28, 1917, respondent, in response to the published invitation for bids, made its proposal for the purchase of the pine at $3.57 and the white fir at 50¢ per M feet. A certified check as required accompanied the proposal (R. 11).

On June 4, 1917, the Special Agent in charge of the Klamath Indian School forwarded to the Commissioner of Indian Affairs an abstract of the bids received, and recommended that respondent's bid be accepted. On June 25, 1917, the Assistant Secretary of the Interior approved the recommendations made by the Commissioner of Indian Affairs on June 16, 1917, that the bid of respondent be accepted. On the same day he advised the Special Agent in charge of the Klamath Indian School of the acceptance of respondent's bid and directed him to prepare the contract and bond and submit it to the Department (R. 11).

The contract was entered into July 28, 1917, and approved by the Assistant Secretary of the Interior on September 14, 1917 (R. 11).

Pursuant to the provisions of paragraph 80 of the contract of July 28, 1917, respondent furnished a penal bond in the sum of $40,000 to guarantee the performance of its contract. The makers of the bond obligated themselves to pay to the United States the penal sum therein named on condition that the obligation of the bond would be inoperative in the event that respondent faithfully observed all the laws and regulations made for the governing of trade and intercourse with the Indians and complied with the regulations and terms of the contract (R. 15).

By the language of the written contract, the Superintendent of the Klamath Indian School agreed to sell to respondent, upon the terms and conditions therein stated, the timber on the area stated, and the respondent agreed that prior to April 1, 1932, it would cut and remove the timber covered by the contract and pay the Super-

intendent, for the use and benefit of the Klamath tribe of Indians, the value of the timber as stated in the contract.

The relevant portions of the contract are set out in the Special Findings of Fact (R. 11-14).

The act of March 2, 1907 (34 Stat. 1221), authorized the Secretary of the Interior, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he might deem to be capable of managing his or her affairs, and to cause to be allotted to such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which such Indian was a member, and to place such pro rata share of such fund to the credit of the Indian concerned upon the books of the Treasury, and subject to the order of such Indian (R. 40).

The contract contained a provision which in effect gave the Indians that were holders of the allotments embraced in the sale area the option to include their allotment in the contract of July 28, 1917 (R. 13).

This provision of the contract was as follows:

> "The sale area includes 14 allotments, comprising approximately 2,240 acres, as to which the purchaser agrees to enter into separate contracts with the Indians who desire to sell, and to pay to such Indians ten per cent of the estimated value of the timber on each allotmen within thirty days from the approval of the contracts, it being understood and agreed that this contract merely authorizes the purchaser to enter into contracts with the individual Indians for the timber on allotments within the sale area at the prices fixed for unallotted land" (R. 13).

No controversy with which we are here concerned arose in the performance of the contract prior to on or about April 1, 1928, the commencement of the third year of the fourth three-year period, which began April 1, 1926. The Commissioner of Indian Affairs (who will be hereinafter referred to as the "Commissioner") on or about that date gave notice that effective that date the price of the timber for the remainder of the three-year period would be increased by 40¢ per M feet (R. 32). Respondent, being unable to convince the Commissioner of the unlawfulness of this increase, continued thereafter to perform the contract but addressed a letter to the Commissioner protesting the increase and giving notice that the cash advances paid by it under the terms of its contract should not be applied to the payment for timber at a rate greater than $4.90 per M feet for pine, the pre-existing rate. Respondent also said in this letter that said protest was intended as a continuing one and if the deposits made by it were applied at the increased rate, respondent would seek to recover from the Government the amount of the excess so applied (R. 29).

On May 4, 1929, the Commissioner further informed respondent that the price during the year beginning April 1, 1929, would be the same as in the preceding year (R. 31) Respondent again addressed a letter to the Commissioner, referring to its previous protest. It protested that no part of the deposits made by it should be applied to the payment for timber at a rate greater than $4.90 per M feet. The Commissioner was informed that if applications were made at a rate in excess of that; respondent would take such action as was necessary to recover from the Government the excess amount so applied (R. 31).

The quantity of pine cut by respondent in the period April 1, 1928, to March 31, 1931 (when all of the timber had been cut), totalled 62,736,390 feet. That quantity of timber multiplied by 40¢ per M feet, the amount of the challenged price increase made effective April 1, 1928, and continued in effect during the remainder of the contract, totalled $25,094.56 which was the amount sued for and for which judgment was awarded.

The controversy in the Court of Claims (except for the question of jurisdiction) was as to the legality of the increase in the price made by the Commissioner (R. 1).

The suit was filed April 1, 1931. On April 25, 1934, petitioner filed a motion for leave to withdraw the general traverse filed May 11, 1931, and filed a plea to the jurisdiction in lieu thereof. On November 5, 1934, the plea to the jurisdiction was argued and on December 3, 1934, it was overruled without prejudice. Evidence was taken and the case was argued and submitted on the merits October 8, 1937 (R. 10).

The question of the correctness of respondent's position as to the imposition by the Commissioner of the additional charge of $25,094.56, which was the point upon which most of the time and effort were spent in the court below, is not brought forward by petitioner in this court, the petitioner apparently conceding the correctness of respondent's position. We are concerned here therefore only with the question of jurisdiction (except for a minor question in regard to the allotted lands, to which we shall refer later).

With respect to the method of paying for the timber under contracts such as the one of July 28, 1917, the practice followed by the Office of Indian Affairs was for the purchaser to make to the Superintendent an advance pay-

ment such as stipulated in Article 4 of the contract (R. 42), against which would be charged the timber subsequently cut on the basis of the contract price and to repeat this operation from time to time.

The Act of March 3, 1883 (22 Stat. 582, 590), as amended by the Act of May 17, 1926 (44 Stat. 560), provides in substance that the proceeds of sales of timber on any Indian reservation, except those of the Five Civilized Tribes, shall be covered into the Treasury under the caption "Indian moneys, proceeds of labor," for the benefit of the tribes and under such regulations as the Secretary of the Interior shall prescribe (R. 40).

The acts of April 30, 1908 (35 Stat. 70), and June 25, 1910 (36 Stat. 855), authorized any Indian Agent, Superintendent, etc., to deposit Indian money, individual or tribal, coming into his hands as custodian, in such private banks as he might select, subject to the requirement that such banks execute a bond in the form approved by the Secretary of the Interior, to safeguard such funds (R. 41).

The tribal timber contract of July 28, 1917, and the several contracts made by respondent with the holders of allotments were administered as one contract and all the proceeds arising under such contracts were paid to the Superintendent of the Klamath reservation (R. 41).

Upon receipt of the proceeds from the purchaser, the Superintendent made a credit upon the books kept in his office at the Klamath Agency in Oregon showing the amount of money payable to the Klamath Indian tribe and also the respective sums of money payable to the individual Indian allottees concerned. These amounts were determined from reports showing the quantity of timber cut from the respective areas (R. 42).

All the proceeds paid by respondent for timber cut under the tribal timber contract and the several allotment contracts, less the sum of 8% thereof, were deposited by the Superintendent either in the Treasury of the United States or in private state banks. The proceeds from the tribal contract were deposited in the Treasury under an account designated "Indian moneys, proceeds of labor, Klamath Indians" (R. 41). The moneys belonging to individual Indian allottees were deposited in private banks in a lump sum to the credit of the Superintendent or disbursing officer of the Indian Agency who held such moneys in trust for the respective Indian allottees. The bank selected as depositary for individual Indian moneys kept no record of the individual Indian accounts; that is, the trust funds were subject to withdrawal by the Superintendent of the reservation and were distributed by him to the individual owners thereof under regulations prescribed by the Commissioner and approved by the Secretary of the Interior (R. 42).

The sum of 8% was deducted from the proceeds paid by the purchaser to the Superintendent for the timber; in accordance with Paragraph 21 of the amended Regulations, approved March 17, 1917, and the provisions of Section 1 of the Act of February 14, 1920 (41 Stat. 415), which authorized the Secretary of the Interior, under such regulations as he might prescribe, to charge a reasonable fee for the work incidental to the sale of timber, or in the administration of Indian forests, to be paid from the proceeds of sales of such timber. This 8% was deducted by the Superintendent from the gross proceeds and held by him in a separate account, which account was used to defray the expenses of administering the contracts of sale and the Indian forests. It was deposited in the Treasury to the

credit of the United States, under the caption "Miscellaneous Receipts" (R. 41-42).

SUMMARY OF ARGUMENT.

1. The Court of Claims had jurisdiction because the suit is a claim founded upon an express contract with the Government of the United States. The basis of the contract of July 28, 1917, is the Act of June 25, 1910, c. 431, 36 Stat. 855, 857 (U. S. C. Title 25, Sec. 406) which directs that the timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior. These regulations provide, not that the Indian tribe may sell the timber or even have a voice in the sale of it, but that it shall be sold by the joint action of the Commissioner of Indian Affairs, the Superintendent of the Indian Reservation and the Secretary of the Interior, each doing his part. If respondent may be deemed to be the "party of the second part" in the contract, then the Government of the United States may be said to be the "party of the first part," for it is with it that the contract was made. The performance of the contract, from the Government's point of view, was supervised by the officers mentioned. The authority (within certain limitations) to increase the contract price was vested in the Commissioner of Indian Affairs. It was the United States, through its duly appointed officers, who served notice upon respondent that unless it paid the added price (40¢ per M feet, which the Court of Claims held was illegally demanded), its cutting of the timber would be stopped. The money paid by respondent under the contract, including that paid under protest and now in controversy, was paid to the Superintendent and was ultimately covered into treasury of the United States.

2. The United States is liable upon a contract made by it in its capacity as Trustee or Guardian of the Klamath Indians. Section 145 of the Judicial Code is broad and grants to the Court of Claims jurisdiction to hear and determine all claims founded upon "any contract, express or implied, with the Government of the United States." The contract of a trustee or guardian imposes a personal liability upon such representative, unless the contract itself provides otherwise. There is no limitation or exception in the language of Section 145 of the Judicial Code, and there are no just grounds for limiting the broad consent of the United States to be sued, as expressed in said section.

3. The Court of Claims had jurisdiction because the suit is a claim founded upon an implied contract of the Government of the United States to return the money paid under protest if it should be determined that such amount was illegally demanded. The United States, through its duly authorized officers, was threatening to refuse to permit respondent to continue its logging operations on the lands under the contract. There was no doubt that it, right or wrong, had the power to do this. To avoid this greater loss, respondent complied with the demands of the United States, but gave notice that it did so under protest and would sue to recover the money from the Government. The money so paid was covered into the Treasury. The Court of Claims found that this amount was illegally demanded of respondent. Petitioner in this court does not assail the correctness of this finding. There was an implied contract that under these circumstances the money would be repaid.

4. After the Court of Claims had rendered judgment petitioner, for the first time, made the point that of the

62,736,390 feet of timber cut after the increase was made effective, it had not been shown how much came from the allotted lands. The contention is now made that the contracts for the timber on the allotted lands were contracts, not of the United States, but of the individual Indians, and that as to such contracts a recovery cannot be had, even though a recovery be allowed as to the contract covering the unallotted lands. Hence it is urged that if the judgment of the Court of Claims is not reversed, nevertheless, the case should be remanded for an accounting as to this one point.

Neither the findings of the Commissioner of the Court of Claims nor an examination of the record discloses that any timber was cut by respondent from allotted lands. (The Court of Claims does find that respondent entered into twenty-one contracts with individual Indian allottees. (R. 39[1]).

Hence, on the record there is no basis for the contention made by the petitioner as to the allotted lands. (After this point was made by petitioner in its Motion for New Trial in the Court of Claims, respondent made an investigation and discovered that excess payments to the amount of $116.46 had been made with respect to timber cut from allotted lands, the correctness of which amount was conceded by Government in a brief filed in the Court of Claims.[2])

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[1]There is no finding in the Forest case that any contracts with individual allottees were entered into by respondent Forest Lumber Company.

[2]The situation is similar in the Forest case, except in this case respondent found the excess payments as to allotted lands to be $29.94 and the Government found them, according to the brief mentioned filed in the Court of Claims, to be $3,200.89.

The provisions in the contract of July 28, 1917, relating to the allotted lands and hereinbefore referred to, amounted to no more than an option to the Indian allottees to avail themselves of the contract of July 28, 1917 (R. 13, 39). They could either elect to come in under this contract or not to do so. If the former, all of the terms and provisions of the contract of July 28, 1917, would apply to the allotments. There would be no change in price or in any of the other terms of the contract, and the United States would operate the contract as far as the allotments were concerned to the same extent and in the same way as it would operate the contract as to the unallotted lands. The allottees would have no voice in fixing the price or in making any of the other terms of the contract and no voice in its control and management. These would rest in the United States.

Where allottees exercised their option to come in under the contract of July 28, 1917, there remained, in reality, but one contract (R. 41) and the contract was that of the United States.

Payments made by respondent for timber cut under allotment contracts were made directly to the Superintendent of the Klamath Agency and this officer was instructed by the Commissioner of Indian Affairs, upon receipt by the latter of respondent's protest, to retain in all individual Indian accounts a sufficient amount to cover a refund of 40¢ per M feet on all timber cut from allotments and paid for at the advanced price effective April 1, 1928 (R. 31). Since the money which was illegally demanded of respondent was impounded in the hands of the United States, the decision of the Court of Claims ordering its return was correct. Furthermore, the amount involved is inconsequential. It is only $116.46.

ARGUMENT.

I.

The suit involves a claim founded upon an express contract with the Government of the United States.

The nature of the interest of the Indians in lands such as those as were the subject of the contract of July 28, 1917, has been made clear by the decisions of this Court and no discussion thereof is deemed necessary here. It may be seen from the recent opinion, *United States v. Shoshone Tribe of Indians*, 304 U. S. 119. In essence, it is that the Indians are entitled to the complete use and enjoyment of the lands, including the timber thereon and the minerals therein, and the United States holds the title and has the management and control of the lands for the use and benefit of the Indians.

Prior to February 16, 1889, there was no statutory authority for the sale of such lands by the United States. On that date there was passed the Act of February 16, 1889 (25 Stat. 673). This act was superseded by the Act of June 25, 1910 (36 Stat. 855), by virtue of which the sale evidenced by the contract of July 28, 1917, was made.

Section 7 of the Act of June 25, 1910, is as follows:

> "Sec. 7. That the mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: Provided, that this section shall not apply to the states of Minnesota and Wisconsin."

It will be observed that the policy declared by Congress in this legislation was not that sales might be made by the Indian tribe if approved by an executive officer of the Government or be made by the tribe to any extent whatsoever, but was that the sales should be under regulations to be prescribed by the Secretary of the Interior, retaining in the executive branch of the Government of the United States complete and exclusive authority for the making of sales of Indian timber.

Section 17 of the regulations prescribed by the Secretary of the Interior pursuant to this Act directs that sales involving a stumpage value of not exceeding $50,000.00 may be made from unallotted lands by the Commissioner of Indian Affairs, or from allotments with his approval, and that sales involving a stumpage value exceeding $50,000.00 shall be made (that is, by the Commissioner) only with the express approval of the Secretary of the Interior (R. 15).

The detailed statement, hereinbefore set out, of the steps taken by the administrative officers of the Government leading up to the making of the contract of July 28, 1917, indicates that everything done was included within the authority conferred by the Act and the regulations made pursuant thereto, and that the action taken by parties to the contract other than respondent was solely that of officers of the Government and in no sense whatever that of the Indian tribe.

After the contract had been entered into, it was the officers of the United States with whom respondent dealt in performing the contract. It was the Commissioner of Indian Affairs upon whom was conferred the authority (within certain limitations) to increase the initial contract price for successive three-year periods. It was an

administrative officer of the Government, that is the Superintendent of the reservation, who admitted respondent to the possession of the lands to carry on its logging operations. It was such officers of the Government that respondent was required to satisfy as to its method and manner of conducting its logging operations. It was such officers who could dispossess respondent at any time if it failed to conform to the requirements of the contract. It was to one of such officers of the Government of the United States that respondent made its payments under the contract and it was into the Treasury of the United States that these payments were covered.

If respondent could be said to be the "party of the second part" to the contract, the Government of the United States could just as truly be said to be the "party of the first part."

Unwarranted emphasis and importance, we submit, is by petitioner, in its brief, placed upon and attached to the single clause in the contract of July 28, 1917, reading:

> "This agreement made and entered into at the Klamath Indian School, State of Oregon, this 28th day of July, 1917, * * * between the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians, party of the first part, and the Algoma Lumber Company, of Algoma, State of Oregon, party of the second part."

This, petitioner would have the court take as conclusive on the question as to who are the parties to the contract. This reasoning, we submit, is unsound. The form of the contract, of which the clause quoted is but a very small part, is itself only a single item in a comprehensive plan for selling Indian timber prescribed by the De-

partment of the Interior pursuant to the act of 1910. The whole plan and procedure promulgated by the regulations is to be taken into consideration in determining the nature of the status of the United States in the transaction, and when this is done it becomes apparent that the agreement was entered into not so much "for and on behalf of the Klamath Indians" as "for and on behalf of the Government of the United States."

This point was clearly perceived and admirably stated by Justice Green, speaking for the Court of Claims in the *Lamm Lumber Company* case, when he said:

> "We think that where one executes a contract solely under his own powers and rights, he becomes liable thereon, although the instrument specifies that it is executed in behalf of and for the benefit of a third party. The fact that a contract is entered into by one party for and on behalf of another party does not necessarily make the contract one of the party who acquired the beneficial interest."

The relationship of the United States to such a contract as that of July 28, 1917, was brought in question in the case of *United States Fidelity & Guaranty Co.* v. *Bramwell, Superintendent of Banks for the State of Oregon*, 295 Fed. 331, 333, affirmed on appeal by the Circuit Court of Appeals, 9th Circuit, 299 Fed. 705 (1924) and by this Court in *Bramwell* v. *United States Fidelity Company*, 269 U. S. 483. A bank in Klamath Falls, in which there had been deposited to the credit of the Superintendent of the reservation money paid under a contract such as this, had failed and to the claim of the Government for priority, such as it would be entitled to if the moneys had been moneys of the United States, the objection was interposed

that the contract under which the money was deposited was made for the benefit of the Indians and that the deposits were not really the moneys of the United States. The lower court, in rendering the decision which was affirmed, said:

> "The position of the defendant is that the statute giving the United States priority was designed to protect the public revenues, * * * and since the debt here in question was for money held by the United States for the use and benefit of the Indians residing on the Klamath Indian Reservation, the statute has no application. * * * The language is general and without qualification. It applies to all persons indebted to the United States. The form of the indebtedness is immaterial. *Lewis* v. *U. S.*, 92 U. S. 618, 23 L. Ed. 513.
>
> "The debt here in question was due from the bank to the United States, both by the terms of the deposit and the condition of the bond given for its security. The United States was the only party to which the obligation ran, and which could enforce it. It is true the money was held in trust for the use and benefit of the Indians, but that does not make the indebtedness of the bank any the less an indebtedness to the United States. The United States, under the treaty with the Klamath Indians (16 Stat. 707) and various acts of Congress (R. S., Secs. 441, 465 and 2068 [Comp. St. 681, 723, 4014]; Comp. St., Secs. 4069 and 4072; 36 Stat. 856; 40 Stat. 591 [Comp. St., 1918, Comp. St. Ann., Supp., 1919, Secs. 4077aa, 4078a]), is the guardian of the Indians on the reservation, and as such supervises and manages their affairs, collects and disburses funds intended for their benefit, and may sue to enforce and protect their rights and obligations. * * *"

Light is thrown on the question as to whether this is a contract with the Government of the United States if we

consider for a moment what would have been the result, from a legal standpoint, if during the course of the performance of the contract by respondent, the Commissioner of Indian Affairs, or one of the other executive officers of the United States charged with the duty of administering the contract, had, by an improper exercise of authority in the discharge of the duties of his office, ejected respondent from the lands and unlawfully denied it the right to continue to cut timber under the contract. The control over the possession and enjoyment of the use of the lands was in the executive branch of the Government of the United States and if it at any time had determined that respondent should no longer be permitted to cut the timber, respondent would have been compelled to withdraw. If this withdrawal had taken place because of an improper and unwarranted exercise of authority by the officers of the Government of the United States, in the discharge of their duties, the damages resulting from the breach of contract would have given rise to an action based upon the contract of which the Court of Claims would have jurisdiction.

The position taken by the Commissioner of Indian Affairs resulted in respondent's being confronted with the necessity either of paying the increased price, unlawfully demanded, or relinquishing possession of the lands and thereby sustaining a greater loss. The Commissioner of Indian Affairs served notice that effective April 1, 1928, no timber could be cut unless it was paid for at an increased price of 40¢ per M. This was in effect notice to respondent that unless it complied with this demand it would be forced to withdraw from the premises. It might have taken the latter course and instituted suit against the Government for the loss resulting. As to such a

suit, it would seem that the jurisdiction of the Court of Claims was clear. It chose the other course in order to mitigate the damages. It paid the amount demanded, but it served notice that it did this under protest and only in order to avoid the larger loss; that it would sue to recover the amount due from the Government. Such is this suit.

This point is well stated by Justice Williams of the Court of Claims in the concluding part of his opinion in the *Forest Lumber Company* case:

> "The defendant further contends that the contract sued upon is not a contract with the United States within the meaning of section 145 of the Judicial Code, and that the suit is, therefore, not maintainable under the Court's general grant of jurisdiction. It is urged that in making the contract the defendant's officials were merely acting for the Indians in their behalf and for their interest, and that consequently there was no responsibility on the part of the defendant for the performance of the contract. In other words it is contended the contract is not a contract by the defendant but a contract of the Klamath Indians. The contract recited it was made by 'the Superintendent of the Klamath Indian School, for and on behalf of the Klamath Indians,' and that the purchaser agreed to pay the value of the timber to 'the Superintendent of the Klamath Indian School, State of Oregon, for the use and benefit of the Klamath Tribe of Indians.' The contract referred to the Klamath Indians as the 'party of the first part' which agreed to sell to the plaintiff certain timber and the final agreement was that the plaintiff should pay to the Superintendent of the Klamath Indian School 'for the use and benefit of the Klamath Tribe of Indians' the value of the timber at prices fixed in the contract.

But that the Government was not the agent of the Indians is clear. An agent is one who acts for another under authority given by the other party. The Government did not act under any authority given by the Indians. It acted in its own right somewhat in the manner that a guardian might act for a ward. The contract was executed by the Superintendent of the Klamath Indian School by authority of law. In what he did he was acting for the Government, and in what the Government did it was acting under its own rights and powers. It was not authorized by the Indians to make the contract nor was it approved by them, it was approved by the Secretary of the Interior. While the Indians had a beneficial interest in the timber to be cut they lacked power to dispose of it, and any contract made by them would not be binding; and, as it would not be binding upon the Indians it would not be binding upon the other party and would be merely a nullity. The contract was executed and approved by the officials of the defendant in strict accordance with the laws of the United States. Undoubtedly, the contract is a contract of the defendant within the meaning of section 145 of the Judicial Code."

Congress has made specific provision as to the matter in which contracts with the Indian Tribe shall be executed. These provisions, formerly Section 2103 of the Revised Statutes, are now contained in Title 25, U. S. C., Section 81. This section, which we set out in full, *infra*, p. 27, requires, among other things, that the agreement be executed before a judge of a court of record. Admittedly, the requirements of this section were not complied with. In fact, the Court of Claims found that no contracts for the sale of Indian timber have ever been made in the form and manner prescribed by it (R. 40). Were the contract

of July 28, 1917, actually one with the Klamath Tribe of Indians, the contract would be void under the decision of this Court in *Green* v. *Menominee Tribe of Indians*, 233 U. S. 558.

We submit that the failure of the officers of the Department of the Interior to comply, or cause compliance to be made, with the provision of this section is cogent proof that the contract of July 28, 1917, was not a contract with the Klamath Indians.

II.

It is undoubtedly true that the picture of the ordinary trustee or guardian, in private life, does not fit precisely the situation of the United States as it exists with respect of the Indians. However, this Court as late as the *Shoshone Tribe case, supra*, has used the term "guardian" as representing the relationship of the United States to the Indians and refers to the rule governing transactions between a guardian and his ward as an analogy in its consideration of the construction of a treaty between the United States and the Shoshone Tribe. It is indubitably true that the United States may be a trustee. *McDonogh's Executrix et al.* v. *Murdoch et al.*, 15 How. 68. It is also clearly established that the contracts of a trustee are personally binding upon the trustee, unless the contract provides against such personal liability. *Taylor* v. *Mayo* (*Taylor* v. *Davis*), 110 U. S. 330. In this case, the Court, in holding trustees liable upon an agreement which bore their signatures followed by words indicating their trust capacity, used the following language:

> "A trustee is not an agent. An agent represents and acts for his principal, who may be either a natural or artificial person. A trustee may be defined

generally as a person in whom some estate, interest or power in or affecting property is vested for the benefit of another. When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound, for he has no principal."

This is in accordance with the statement in Section 262, Restatement of Trusts, where it is said:

"Except as stated in Section 263, the trustee is subject to personal liability upon contracts made by him in the course of the administration of the trust."

The exception in Section 263 of the Restatement is limited to cases where by the contract it is provided that the trustee shall not be personally liable.

III.

The Court of Claims had jurisdiction because the suit is a claim founded upon an implied contract of the Government of the United States to return the money paid under protest if it should be determined that such amount was illegally demanded.

If it should be held that the contract of July 28, 1917, was one which did not pertain to purely governmental affairs and that for this reason, although a contract of the United States, was not such a one as was contemplated by Section 145 of the Judicial Code, we nevertheless submit that the Court of Claims had jurisdiction because of the implied contract, on the part of the Government of the United States, under the circumstances, to return the money paid under protest.

In saying this, we are not unmindful of the fact that it is well established that as to liability on implied con-

tracts, the United States is liable only upon a contract implied in fact and not upon a contract implied in law. *Goodyear Tire & Rubber Co. v. United States*, 276 U. S. 287, 293, and cases there cited.

This is a case of a contract implied in fact.

Proceeding with the performance of the contract of July 28, 1917, and depending upon the logs to be obtained thereunder for the logging of its sawmill, respondent received notice on or about April 1, 1928, from the Commissioner of Indian Affairs that, effective that date and continuing for at least one year, the contract price of the timber would be increased 40¢ per M feet. The implication of the notice, after all efforts to convince the Commissioner of Indian Affairs of the illegality of the demand had failed, was that unless payments were made at this rate respondent would be denied the right to continue its logging operations under the contract. Respondent decided that, rather than submit to having itself dispossessed, it would pay the increased amount under protest and notify the Commissioner that the deposits made by it under the contract should not be applied at a rate greater than the price prevailing just before the increase of 40¢ per M was made, and notify the Commissioner further that if such deposits were applied at a greater rate, respondent would seek to recover from the Government the amount of the excess so paid. Payments were made accordingly and respondent remained in possession of the lands until March 31, 1931, when all of the timber had been cut, the Commissioner having continued the 40¢ increase in price in effect up to that time over the protest of respondent. The increase accounted for the amount for which suit was filed by re-

spondent. It was covered into the Treasury of the United States. The Court of Claims has sustained the contention of respondent that the amount was illegally demanded and the correctness of this holding is not questioned in this court. We submit that because of these circumstances the United States is liable on an implied contract to pay the amount sued for.

Northern Pacific Ry. Co. v. *United States*, (Court of Claims) 18 F. Supp. 543, 560, certiorari denied 302 U. S. 750.

Knote v. *United States*, 95 U. S. 149.

In *Northern Pacific Ry. Co.* v. *United States, supra*, the Government held certain bonds of the Railway Company deposited to secure an advance payment under the guaranty provisions of the Transportation Act. The Government asserted a claim for over-payment. The Railway Company agreed with the Comptroller General that the bonds might be held as security and that it would pay the amount demanded upon final determination by a court of last resort that it owed the Government such amount. After an unsuccessful attempt to secure review by certiorari of the Interstate Commerce Commission's determination that the amount was due, the Railway Company paid the claim of the Government to procure a release of the bonds and stop the running of interest, making the payment under protest and without admitting the legality of the claim. It was subsequently held that the claim was invalid. The Railway Company brought suit in the Court of Claims to recover

the amount paid. The Court of Claims held that the Railway Company was entitled to recover the amount, saying

> "There can be no doubt that the government's demand was illegal. That fact was definitely determined in the case of *U. S.* v. *Great Northern Railway Company.* Nor can there be any doubt that the payments were reluctantly made in consequence of the illegal demand, that being the only way in which plaintiff could regain possession of its property. In view of these facts we are impelled to hold that the payments sought to be recovered were involuntarily made by plaintiff, and under circumstances amounting to coercion and duress. The Secretary of the Treasury necessarily accepted the payments made by plaintiff upon the terms set forth in the letter of plaintiff's counsel tendering the payments, and an implied contract thereupon arose on the part of the defendant to refund the payments so made in case plaintiff was not indebted to the United States. Plaintiff is therefore entitled to recover and is hereby awarded judgment in the sum of $1,521,696.93."

IV.

We have discussed in the concluding portion of our summary of argument (*supra*, pp. 9-12) the point made by the Government with reference to payments for timber cut from allotted lands, and we believe we have there fully shown that the decision of the Court of Claims ordering the return of the illegal increase with respect to such timber was correct.

CONCLUSION.

We submit that the Court of Claims had jurisdiction of the cases under Section 145 of the Judicial Code, and that its judgments should be affirmed.

Respectfully submitted,

JESSE ANDREWS,
CARL D. MATZ,
WILLIAM S. BENNET,
Attorneys for Respondents, Algoma Lumber Company and Forest Lumber Company.

December, 1938.

APPENDIX.

Section 2103 of the Revised Statutes (U. S. C., Title 25, Section 81) provides as follows:

"§81. CONTRACTS WITH INDIAN TRIBES OR INDIANS. No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

"Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

"Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority, and the reason for exercising that authority, shall be given specifically.

"Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and,

if for the collection of money, the basis of the cla the source from which it is to be collected, disposition to be made of it when collected, amount or rate per centum of the fee in all ca and if any contingent matter or condition constitu a part of the contract or agreement, it shall specifically set forth.

"Fifth. It shall have a fixed limited time to ru which chall be distinctly stated.

"Sixth. The judge before whom such contra or agreement is executed shall certify officially time when and place where such contract or agre ment was executed, and that it was in his presence and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the commissioner and secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."